[2026] JMCA Crim 15

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2021CR0005

WARREN ATKINSON v R

Nicholas Edmond for the applicant

Ms Kathy Ann Pyke for the respondent

5, 6 December 2023 and 5 June 2026

Criminal Law – Evidence – Identification – Standard of proof – Whether identification evidence sufficient to meet standard of proof

Criminal Law – Evidence – Caution statement – Whether trial judge should have permitted editing of part of caution statement prejudicial to co-accused

Criminal Law – Evidence - Summing up – identification – Whether trial judge wrongly considered evidence of co-accused in assessing evidence of applicant

EDWARDS JA

[1] On 6 November 2020, Mr Warren Atkinson ('the applicant') was convicted of the offences of illegal possession of firearm and shooting with intent by Sykes CJ ('the learned Chief Justice'), in the High Court Division of the Gun Court holden at King Street, in the parish of Kingston. On 21 January 2021, the learned Chief Justice sentenced the applicant to 15 years' imprisonment and 21 years' imprisonment, respectively, both at hard labour.

[2] The prosecution's case was that on 10 May 2017, in the parish of Saint Catherine, the applicant was one of three men who, having been involved in a robbery spree, engaged a team of three policemen in a shootout whilst trying to escape apprehension. The three men were caught and charged with unlawful possession of a

firearm and shooting with intent. They were tried together in a two-count indictment, the particulars of offences being that, they "unlawfully had in their possession a firearm not under and in accordance with the terms and conditions of a Firearm User's Licence" (count 1), and that they "shot at Gersham Francis with intent to cause him grievous bodily harm" (count 2).

[3] At trial, the prosecution relied on the evidence of six witnesses, one of whom was Constable Gersham Francis ('the complainant'), who gave evidence of what took place at the material time. The other two officers involved in the incident did not give evidence.

[4] The statements of four police officers, involved in the investigation and video identification parade, were admitted by agreement between counsel. The Justice of the Peace, Mr Marvin Hayden ('Mr Hayden'), who is alleged to have witnessed the taking of the caution statement of one of the applicant's co-accused, Mr Glendon Gordon ('Mr Gordon'), gave evidence. Mr Gordon's statement was tendered and admitted into evidence through Mr Hayden and read into the record. That statement implicated the applicant by naming an individual by the aliases "Wormy" and "Worm" and placing that individual in the vehicle as an active participant in the robbery that took place prior to the relevant shooting. It also identified that individual as one of the persons who had fired shots at the police at the material time. It was generally accepted at the trial that the applicant was known by the alias "Wormy". The applicant's trial counsel Mr Franklin Grenyion, queried of the learned Chief Justice whether that part of the statement that implicated the applicant should be edited, but, after a short discourse, that course was not pursued.

[5] Mr Grenyion made a no case submission on the applicant's behalf, which was refused by the learned Chief Justice. The applicant gave an unsworn statement in which he asserted that he had an alibi for the time of the murder. He claimed that, at the material time, he was with his girlfriend and child at home. His girlfriend was the only witness called in his defence, and she gave evidence in support of his alibi.

[6] At the end of trial, having assessed the evidence and submissions before him, the learned Chief Justice returned verdicts of guilty and gave the sentences set out above.

[7] On 23 February 2021, the applicant filed a notice of application for leave to appeal his convictions and sentences. On 2 May 2022, a single judge of this court extended the time for the applicant to apply for leave to appeal, then considered the application and refused it. The applicant, as is his right by law, renewed his application for leave before this court, only in relation to his convictions.

[8] On 5 December 2023, we heard his application and, on 6 December 2023, we made the following orders:

> "i. Application for permission to appeal conviction is refused.
>
> ii. Convictions and sentences are affirmed.
>
> iii. The sentences are reckoned to have commenced on 21 January 2021, the date on which they were imposed, and are to run concurrently, as ordered by the learned trial judge."

[9] These are our reasons, as promised.

Grounds of appeal

[10] At the hearing of the application, the applicant was granted permission to abandon the original grounds of appeal and to argue the following supplemental grounds:

> i. "The learned trial judge misdirected himself as to the issue of the editing of the caution statement of Gordon against the other co-accused [sic] Powell and Atkinson.
>
> ii. The learned trial judge failed to exclude, carefully treat with or warn himself as regards the prejudicial evidence including inadmissible hearsay tending to support identification. This failure occasioned a substantial miscarriage of justice. The learned trial judge failed in his duty to jealously guard the fairness of trial by allowing said inadmissible hearsay.
>
> iii. The learned trial judge though acknowledging weakness as respects the identification evidence against the Applicant

failed to adequately and properly direct himself as to the dangers and need for caution in assessing the evidence identifying the Applicant as one of three offenders.

iv. The learned trial judge failed to demonstrate after acknowledging weakness as respects the identification evidence against the Applicant, what strengthened the "weak" identification evidence of the sole eyewitness to have met the standard of proof.

v. The learned trial judge failed to demonstrate that in his overall assessment of the evidence, that he had distinctly approached the evidence as respects the Applicant without blurring the lines of evidence by contextually assessing the evidence. His summation indicated that he found the complainant's evidence reliable and plausible when juxtaposed to the caution statement of Gordon. His summation reflected that as he reviewed the complainant's evidence though comparing the differences between the identification of Powell and the Applicant, the comparison suggests that assessment was being jointly done.

vi. The learned trial judge though acknowledging an appreciation of the particular weakness in the identification evidence namely the vast period of three (3) years between the incident and eventual identification parade of the applicant, failed to direct himself in a fulsome way as to the totality of the identification evidence as respects the Applicant who was known of but never spoken to or interacted with, the warning that aliases are not as unique as names, the risk that at the time of the arrest of Gordon, the alias Worm/Wormy had been aired."

Ground 1 - The learned trial judge misdirected himself as to the issue of the editing of the caution statement of Gordon against the other co-accused Powell and Atkinson.

A. Submissions

[11] Counsel for the applicant, Mr Nicholas Edmond, submitted that the learned Chief Justice erred in admitting the caution statement into evidence without considering that it contained matters prejudicial to the applicant that ought to have been edited.

[12] Mr Edmond accepted that the caution statement of the applicant's co-accused Mr Gordon was relevant and admissible on the prosecution's case, and that it was admissible in its entirety, since it contained exculpatory averments in respect of Mr Gordon. However, counsel submitted that the learned Chief Justice still ought to have considered editing the statement, in the interests of justice, upon the request of the applicant's trial counsel. It was argued that, in the light of sections 31C, 31CA, and 31CB of the Evidence Act, the learned Chief Justice was wrong when he told trial counsel and the prosecution that they were not entitled to agree to edit the statement amongst themselves without his involvement. Further, counsel argued, the learned Chief Justice should have asked counsel for Mr Gordon whether he was objecting to the statement being edited.

[13] Counsel contended that the result of the statement being tendered in its entirety, was that the prejudicial part of the caution statement that implicated the applicant by his alias "Wormy", was also read into the record. This, he said, would have tainted the learned Chief Justice's jury mind, and could not have been cured by the warnings the learned Chief Justice gave himself, in his summation.

[14] Counsel for the Crown Ms Kathy Ann Pyke, however, submitted that the learned Chief Justice had no discretion to edit the caution statement, as it was not being relied on by the prosecution, against the applicant. Counsel argued that the applicant's co-accused was entitled to have the caution statement admitted in its entirety so that he could rely on the exculpatory parts in his own defence. The learned Chief Justice, it was submitted, properly carried out his duty in accordance with the law, in the circumstances, by directing himself that the statement of the co-accused was not evidence against the applicant. The authorities of **Dennis Lobban v R** (1995) 46 WIR 291, **Regina v Nigel Neil** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 10/1990, judgment delivered 29 July 1991 and **Wallace and Others v The Queen (Jamaica)** (1996) and UKPC 47, were relied on in this regard.

B. Discussion and disposal

[15] Subject to a judge's discretion to order separate trials in the interests of justice, the administration of justice is best served where those jointly charged with a criminal

offence are tried together in cases where it is alleged that they embarked upon a joint criminal enterprise. This, at the very least, avoids inconsistent outcomes from different tribunals of fact hearing the same evidence. Where there is a real risk of prejudice in a joint trial, where evidence is admissible against one defendant but not against the others, the trial judge has a discretion to order separate trials (**Dennis Lobban v R**). Whether that should be done depends on the circumstances of each case. Where it is not done, the co-defendant should be protected by the most explicit directions by the trial judge that "the statement of one co-defendant is not evidence against the other" (see page 304 of **Dennis Lobban v R**).

[16] The principles regarding the exclusion of relevant evidence given by a co-defendant in a statement, by the editing of that statement, was set out by the Privy Council in **Dennis Lobban v R**. In that case, the statement made under caution by an accused was tendered into evidence in its entirety against him. However, the statement also implicated his co-accused. Whilst it was admissible and relevant against the maker as part of the prosecution's case against him, it was inadmissible and irrelevant as against the co-accused and could not form part of the evidence against him. The statement was not edited. The maker of the statement was discharged at the close of the case for the defence, after a successful submission that he had no case to answer, and his co-accused was convicted. His appeal to this court was dismissed and he appealed to the Privy Council.

[17] At page 298 of the report, the Board looked at the problem presented by the case. The statement of the co-accused had been a mixed statement containing admissions and exculpatory explanations and was admissible against him in its entirety. The Board made it clear that it was part of the evidential material against a defendant who did not testify and that such a defendant had the absolute right, subject to its relevance, to have the exculpatory part of his statement placed before the jury. Such a statement, however, is not evidence against a co-defendant and is documentary hearsay.

[18] Having considered the issues surrounding the admission of the statement by the applicant's co-accused without it being edited, the Board looked at the

development of the law and the various authorities dealing with that issue, and at page 302, reiterated the established principles. Those principles are, in précis, that:

i. A trial judge has a discretion to refuse to admit evidence tendered by the prosecution, if its prejudicial effect outweighs its probative value (**R v Sang** [1980] AC 402];

ii. A trial judge has the power, in the interests of justice, to cause part of a written statement made by one defendant which forms part of the prosecution's case against him, to be edited;

iii. That power extends to the exclusion of evidence tendered by the prosecution in a joint trial, against one defendant, by the tool of editing, where the prejudicial effect of such evidence against a co-defendant, far outweighs its probative value in the case against another co-defendant; and,

iv. The discretion to edit in such cases only exists where the evidence is tendered by the prosecution (Keane, Modern Law of Evidence, third edition, 1994, at page 36).

[19] In explaining the operation of these settled principles, the Board, at page 303, said this:

> "**The discretionary power to exclude relevant evidence applies only to evidence on which the prosecution proposes to rely**. It exists to ensure a fair trial to the defendant, or, in a joint trial, to each defendant without seeking to differentiate between the quality of justice afforded to each defendant. **It does not extend to the exculpatory part of a 'mixed statement' on which a co-defendant wishes to rely**. While section 78 of the Police and Criminal Evidence Act 1984 has no counterpart in Jamaica, it is noteworthy in this context that the discretion under section 78(1) to exclude relevant evidence having an adverse effect on the fairness of the

> proceedings only applies to 'evidence on which the prosecution proposes to rely'. And the prosecution was not entitled to rely on any part of Russell's statement against Lobban. **Counsel for Russell was entitled to insist that evidence tending to support Russell's own case, or more accurately, the material favourable to him in a mixed statement, should not be made the subject of editing by the judge**." (Emphasis added)

[20] The Board went on to state, at page 304, that decisions which tend to suggest that "a judge in a criminal trial has a discretionary power at the request of one defendant to exclude evidence tending to support the defence of another defendant…are contrary to well-established principles and do not correctly reflect the law of England, or of Jamaica".

[21] The Board also recognised that where these principles are robustly applied, they will inevitably result in a real risk of prejudice to a co-accused in a joint trial which may be alleviated by separate trials or by "explicit" directions to the jury.

[22] In the instant case, the statement of the applicant's co-accused, Mr Gordon, was tendered, at the trial, through the prosecution's witness, Mr Hayden, with no objection from defence counsel. Not only did the statement implicate Mr Gordon as being the driver of the Toyota Belta at the material time, but it also implicated the applicant by his aliases "Wormy" and "Worm", as being an active participant in the incident. The statement was, however, being relied on by the prosecution as evidence against Mr Gordon, only. If it were to be accepted by the tribunal of fact, the statement could also have served to exonerate Mr Gordon from being a willing participant in the incident because, in it, he also asserted that he had been forced at gun point by the other men to participate.

[23] Trial counsel for the applicant, Mr Grenyion, did not object to the admission of the statement and did not request to have it edited until it had already been admitted in its entirety as an exhibit, through the prosecution's witness. It was during cross-examination of that witness, before the statement was read into the record, that Mr

Grenyion made an enquiry whether the statement ought to be edited. The exchange between himself and the learned Chief Justice is to be found at page 161 of the transcript. There it is recorded that Mr Grenyion said he was "wondering whether or not there might be a need to edit". In response, the learned Chief Justice stated that the editing could not be done without him (meaning the learned Chief Justice). Mr Grenyion then said "…in that case, m'Lord, it won't be necessary". The learned Chief Justice retorted that, defence counsel, and the prosecution, had "no private editing arrangements", and that what mattered, in any event, was how the information was to be used, if used at all. The statement was then read into the record with no further objection.

[24] It is well accepted that a co-accused has an absolute right to adduce into evidence, in its entirety, a mixed statement so that he may rely on the exculpatory parts of it in his defence. The co-accused also has that right in circumstances where it is the prosecution who has adduced the evidence against him.

[25] Not only did Mr Grenyion fail to make a request to edit the statement before it had been tendered into evidence in its entirety, but when he did make a tentative enquiry as to the need to do so, it was not a definitive request for editing and he eventually did not pursue that course. Additionally, even though the statement in this case was adduced into evidence on the prosecution's case, and not on that of the co-accused, it was a mixed statement that contained exculpatory material that the co-accused was entitled to rely on in his defence. This would have remained so, even though trial counsel for Mr Gordon suggested, during the cross-examination of Mr Hayden, that Mr Gordon did not in fact give the statement, and Mr Gordon denied giving the caution statement in his unsworn statement. He was still entitled to have the benefit of the exculpatory parts of the statement placed before the jury. This much was said by the Privy Council in the case of **Von Starck (Alexander) v R** (2000) 56 WIR 424. In that case, the Board made it clear that a mixed statement must be admitted in its entirety, and a defendant does not deprive himself of the right of the benefit of the exculpatory parts of the statement if he denies having made the statement or sets up an entirely different defence.

[26] Although the naming of the alias "Wormy" raised a potential risk of prejudice to the applicant, we determined that such a risk could be and was alleviated by the most stringent warning given to himself by the learned Chief Justice (see **Wallace and Others v The Queen (Jamaica)** at page 401). In our view, contrary to counsel's suggestion, it made no difference that the learned Chief Justice was both the judge of the law and of the facts. The learned Chief Justice did in fact explicitly remind himself that the statement of the co-defendant, Mr Gordon, was not evidence against the applicant and the other defendant in the case. Furthermore, in recounting and assessing the evidence in relation to the statement, the learned Chief Justice did not mention the applicant or say anything that showed that he was at all using the statement to assess the guilt of the applicant. Nor did the learned Chief Justice refer to the aliases "Worm" or "Wormy" when he recounted the evidence.

[27] In recounting that aspect of the evidence, the learned Chief Justice stated the following, as recorded at pages 306 to 307 of the transcript:

> "…[One] of them look back, him not sure which one, and say, police, police a come". He calls a name. That is not evidence against nobody. So one of the men said to him say, 'Driver, you better drive, you know'. And then the chase begin with wi and the police dem and I heard warning shots from the police.
>
> Then one of the men, he calls the name, but it is not evidence against anybody. One of the men said, 'Drive, mi driver". Then we go on a high speed chase…
>
> The man with the gun, use a name…"

[28] This, we believed, demonstrated that the learned Chief Justice was cognisant of the fact that the content of the statement was not evidence against the applicant and that he did not consider it in assessing the evidence against the applicant. This was also borne out by his detailed analysis of the identification evidence in relation to the applicant (which is discussed in more detail below).

[29] Sections 31C, 31CA, and 31CB of the Evidence Act, which deal with the admissibility of evidence agreed between the parties, subject to compliance with

certain procedural requirements, contrary to counsel's submissions, did not assist the applicant, as the applicant's trial counsel did in fact agree to admit the statement.

[30] We, therefore, found that there was no merit in this ground.

Ground 2 - The learned trial judge failed to exclude, carefully treat with or warn himself as regards the prejudicial evidence including inadmissible hearsay tending to support identification. This failure occasioned a substantial miscarriage of justice. The learned trial judge failed in his duty to jealously guard the fairness of trial by allowing said inadmissible hearsay

A. Submissions

[31] The complaint in relation to this ground was that, although the admission of the statements of the police officers who conducted the video identification parade had been agreed between defence counsel and the prosecution, the portions of them that contained hearsay, particularly in relation to Constables Fagan and Wray who did not give evidence, should have been redacted.

[32] It was submitted that even though the learned Chief Justice stated, in his summation, that this evidence had no evidential value, the fact that he repeated the evidence of the officers who conducted the parades in full, and the evidence that all three officers viewing the parade, including the complainant, had identified the co-accused Mr Romario Powell ('Mr Powell'), could have served to bolster the otherwise "weak" identification evidence of the complainant who was the sole eyewitness to testify. It was further submitted that that error was made worse by the fact that the learned Chief Justice stated that the identification of Mr Powell by the three officers had been made within 17 days of the incident. This, it was contended, would have had the effect of "doubly strengthening the singular evidence of the complainant".

[33] Counsel for the Crown accepted that the impugned statements contained inadmissible hearsay but argued that these statements were agreed by the prosecution and the applicant's counsel. In any event, it was submitted, the evidence was not prejudicial to the applicant, as the applicant was not identified by these officers during the identification parade.

B. Discussion and disposal of ground 2

[34] The identification parade in relation to the applicant was conducted by Sergeant Diane Grant-Taylor. It took place almost three years after the incident, in the presence and with the participation of then counsel for the applicant. There was no complaint by the applicant or his then counsel as to any impropriety in how the parade had been conducted. The complainant properly identified the applicant as one of his assailants during the parade. These were the averments recorded in the statement of Sergeant Grant-Taylor that were relevant to the case against the applicant. Although Sergeant Grant-Taylor's statement also spoke to the participation of Constable Wray in the parade, Constable Wray failed to identify the applicant. That evidence, therefore, could not have been prejudicial to the applicant's case as it neither added to nor detracted from it. There is no mention that Constable Fagan participated in the parade and, therefore, he could not have identified him.

[35] The other impugned statement, that of Sergeant Desmond Roach, spoke to the identification parade in respect of the co-accused Mr Powell, and was not relevant evidence against the applicant. The learned Chief Justice, said as much in his summing up, and he did not rely on that evidence to determine the guilt of the applicant.

[36] In his summing up, at pages 254 to 263 of the transcript, the learned Chief Justice considered, among other things, the evidence contained in the statements, the circumstances in which the parades were conducted, whether the parades had been properly conducted, and the result of the parades. With specific reference to the applicant, he considered that the complainant had identified the applicant, but that Constable Wray had not. He considered whether the parade had been conducted properly and fairly, so that it could be determined that the identification of the suspect had been an unaided, unprompted and independent identification. The learned Chief Justice concluded that there was nothing to suggest that Mr Francis' identification of the applicant was anything but "his own unaided, unprompted identification", and that the identification had been conducted in the presence of the applicant's attorney.

[37] Having rejected the applicant's case, the learned Chief Justice went back to the prosecution's case to assess whether the burden of proof had been met and correctly noted that there was only one identifying witness. He considered the evidence given

by the complainant to assess whether it satisfied him that the prosecution had met its burden in relation to the applicant. He found that it did.

[38] The learned Chief Justice did not rely on anything contained in the statements of the officers, regarding the identification of the co-accused Mr Powell, to bolster the identification of the applicant. Nor did the learned Chief Justice rely on any averments regarding Constables Wray and Fagan, other than to recount that Constable Wray had failed to identify the applicant. We were, therefore, of the view that the evidence complained of was not capable of being prejudicial to the applicant in the circumstances.

[39] We accepted the arguments made by counsel for the Crown in relation to this ground. The relevant statements of the two officers who conducted the identification parades (Sergeant Desmond Roach and Sergeant Diane Grant-Taylor) were agreed by the prosecution and the applicant's trial counsel who, at the time, made no objection to any averment in the statements on the ground of hearsay, or at all.

[40] This ground, thus, had no merit.

Ground 3 - The learned trial judge though acknowledging weaknesses as respects the identification evidence against the Applicant failed to adequately and properly direct himself as to the dangers and need for caution in assessing the evidence identifying the applicant as one of three offenders

Ground 4 - The learned trial judge failed to demonstrate after acknowledging weakness as respects the identification evidence against the applicant, what strengthened the "weak" identification evidence of the sole eyewitness to have met the standard of proof

Ground 6 - The learned trial judge though acknowledging an appreciation of the particular weakness in the identification evidence namely the vast period of three (3) years between the incident and eventual identification parade of the applicant, failed to direct himself in a fulsome way as to the totality of the identification evidence as respects the applicant who was known of but never spoken to or interacted with, the warning that aliases are not as unique as names, the risk that at the time of the arrest of Gordon, the alias Worm/Wormy had been aired

A. Submissions

[41] In relation to these grounds, the complaint was essentially that the learned Chief Justice erred in his assessment of the identification evidence, which was weak, and failed to adequately warn himself of the dangers and need for caution in relying on such evidence. The learned Chief Justice, it was said, having noted that the identification evidence was weak, failed to indicate what evidence strengthened the case enough for the standard of proof to be met, and failed to properly address the possible effect of the length of time between the incident and the subsequent identification parade involving the applicant, the fact that the complainant had never spoken to the applicant before, and that aliases are not as unique as names. Overall, it was contended, the learned Chief Justice failed to show how he resolved the concern as to the reliability of the identification evidence.

[42] Counsel complained further that the learned Chief Justice accepted the complainant's explanation that the applicant's incorrect alias in the statement was a typographical error, without exploring the possibility that it may not have been. He also contended that the learned Chief Justice failed to deal with the inconsistency in the complainant's evidence.

[43] Counsel for the Crown submitted that the learned Chief Justice properly directed himself, in accordance with the **Turnbull** guidelines (**R v Turnbull and Another** [1977] 1 QB 224), as to the special need for caution in relation to the visual identification evidence, particularly in recognition cases. It was argued that the identification evidence of the complainant was of sufficiently good quality to enable the learned Chief Justice to come to the view that the evidence was of the required standard. This was so having regard to the fact that the applicant was known to the complainant before and the identification was not made in difficult circumstances.

B. Discussion and disposal of grounds 3, 4 and 6

[44] The prosecution's case at trial centred around the evidence of the complainant, who was the sole eyewitness to give evidence. He gave evidence that, on the night in question, he was on patrol with two other police officers in Spanish Town, Saint Catherine. They were dressed in plain clothes with marked police vests and travelling

in a marked service vehicle along Port Henderson Road. The complainant was in the front passenger seat of the vehicle. Sometime after 11:00 pm, in responding to a transmission on the police radio, and upon approaching the intersection of Lilliput Road, Dunbeholden Road, and the Spanish Town Bypass, he observed a grey Toyota Belta motor car on Dunbeholden Road coming from the direction of Portmore and heading towards Spanish Town. As the police vehicle approached the Toyota motorcar, three of the car's doors opened and three men came out of the car. One of the men, who was seated in the passenger seat behind the driver, pointed a firearm in the direction of the complainant and his colleagues, and opened gunfire. The complainant exited the vehicle and returned gunfire in the direction of the men. The three men ran off for a short distance, stopped, and then fired at the policemen again. The complainant again returned fire, and the Toyota sped off. The three men continued firing and then ran into nearby bushes.

[45] As to how he was able to properly see the applicant, the complainant said that the Toyota was about 18 to 20 metres from the police vehicle when the shooting started, and traffic lights and streetlights (that were about 10 feet away from the Toyota) illuminated the area. The headlights of the police vehicle were also on. The complainant said that when the applicant came out of the car from the passenger seat behind the driver, the lights of the service vehicle as well as the streetlight were shining on him. The complainant said he had seen the applicant before numerous times in three different communities whilst on patrol, though he never spoke to him. On those occasions, he had observed the applicant for 15 to 20 seconds. He had seen the applicant more than five times in the Jones Avenue community, about two or three times in the Dempshire Pen community, and about three times in the Shelter Rock community. In the Dempshire Pen community, the complainant said he had seen the face of the applicant, and in the Jones Avenue community, he saw the applicant's face and torso. He had known the applicant only by his alias "Wormy". He was able to identify the applicant as the man who had come from behind the driver's seat of the Toyota Belta and fired shots at him. He could see the applicant's entire body, from head to feet, during the incident.

[46] During the confrontation, the complainant said, he saw guns in the hands of two of the men and saw the "muzzle flash" coming from the guns. He knew gunshots were being fired at him based on his training. He took cover by kneeling by the engine block of the police service vehicle. He got back up at the point when the men were running away. Despite this, he was still able to see their faces because they had turned their torsos. The men paused in the middle of the Spanish Town Bypass and engaged the police by shooting at them again. The shooting lasted for one minute. After the shooting had stopped, he observed bullet holes in the service vehicle that had not been there before. When the men were running, they turned their torso and he was able to see the applicant "Wormy". The applicant was to the extreme right of the assailants.

[47] In his assessment of the evidence, the learned Chief Justice considered that the main issue in the case, with respect to the applicant, was one of identification. The learned Chief Justice warned himself that the court needed to be mindful that an honest and convincing witness could still be a mistaken witness, and that even in cases of recognition, mistakes could still occur. He noted that the court had to examine the evidence to determine whether the identifications made by the complainant could withstand scrutiny, so that it could be said that the prosecution had met the standard of proof of beyond a reasonable doubt. He painstakingly examined the evidence of the complainant, particularly the circumstances of the several occasions on which the complainant had said he saw the applicant prior to the incident, as well as the circumstances in which the complainant observed the applicant at the time of the incident and accepted that evidence as being credible and reliable. He found that the circumstances of the identification at the time of the incident had satisfied the **Turnbull** test, particularly that the lighting was adequate, the distance between the applicant and the complainant were sufficiently close to each other, and the complainant had seen the applicant on previous occasions to have recognised him.

[48] Although the learned Chief Justice acknowledged that the prior sightings were not detailed and extensive, he found that the prior sightings occurred in circumstances that had made observation possible and had not been done in difficult circumstances. Based on the evidence recorded in the transcript, the learned Chief Justice was entitled

to so find, and it could not properly be said that he "failed to adequately and properly direct himself as to the dangers and need for caution in assessing the [identification] evidence" or that he "failed to direct himself in a fulsome way as to the totality of the identification evidence" in relation to the applicant.

[49] The learned Chief Justice did consider whether there were any factors that would have hindered the witness' ability to correctly identify his assailants, or that would make it an "identification in difficult circumstances" and he found that there were none.

[50] The learned Chief Justice considered the perspective the defence was trying to paint, by virtue of its cross-examination, as to the circumstances amounting to "difficult circumstances" and the omissions of the complainant that would have made the identification unreliable, and he rejected that perspective (see page 284 of the transcript). For example, he assessed the evidence elicited under cross-examination as to how long the entire incident lasted, how long the actual shooting lasted, whether the complainant was able to properly observe the assailants if he had indeed taken cover by kneeling to the side of the Toyota Belta, and, the fact that the complainant had to fix a jam in his M16 firearm whilst the incident was taking place (see pages 268 to 271 of the transcript). He also considered the suggestions made to the complainant regarding omissions in his statement as to him following the men into the bushes to search for them and as to how many men had opened fire on him and how many guns he saw. The learned Chief Justice resolved these issues by considering that the witness was sticking to his answer that, although three men had alighted from the vehicle, he only saw two guns. He considered the witness' reference to "other men" shooting at him in addition to the applicant, to be a matter of grammar.

[51] As to the weaknesses identified in the evidence by the learned Chief Justice, it was not true to say that he failed to resolve them. The learned Chief Justice identified two weaknesses in relation to the identification evidence. The first was that the parade at which the applicant was identified took place almost three years after the incident took place. The learned Chief Justice noted that no complaint had been made as to the conduct of the parade, but considered that he still had to assess whether the

parade had been conducted properly and fairly so that it could be said that "any identification that arose from it was the witness' unaided, unprompted, independent identification of the suspect". Having done that, he concluded that there was nothing in the evidence to suggest that the complainant's identification of the applicant was anything but "his own unaided, unprompted identification", and that the parade had taken place in the presence of the applicant's attorney. At page 315 of the transcript, again, having gone through all the evidence in the case, the learned Chief Justice concluded the following:

> "…I am satisfied so that I feel sure that Mr. Francis did go on the video parades, one in 2020, and three year's [sic] later, that's a weakness, but it is not sufficient for me to say that the identification is unreliable or incurably bad. The delay between the incident and the identification is not in and of itself fatal. No case law says that. It is a factor that you take into account and weigh it along with the other evidence in the case."

[52] The second weakness the learned Chief Justice noted was that there was no evidence as to when the complainant had last seen the applicant prior to the incident. However, the learned Chief Justice recalled the complainant's evidence that he had last seen the applicant in "2016 going into 2017", and determined that, even though the complainant had not given an exact date, it had been at a time near to the date of the incident in 2017. At page 314 of the transcript, the learned Chief Justice concluded that although the evidence of prior knowledge was not the strongest, it was not fatal to the evidence that he had seen him before. This was a logical conclusion that was open to the learned Chief Justice to arrive at based on the evidence before him.

[53] Furthermore, we found no merit in the complaint that the learned Chief Justice wrongly accepted the complainant's "wrongful" citing of the applicant's alias as a typographical error, without considering that it may not have been. He was entitled to do so based on the context in which the issue arose and based on the complainant's explanation. That was a matter of credibility for the learned Chief Justice's discretion.

[54] The learned Chief Justice assessed the applicant's unsworn statement, as well as his witness' evidence which attempted to provide the applicant with an alibi and found that the evidence defied logic. The learned Chief Justice, therefore, rejected the applicant's alibi. Having done so, however, he went back to the prosecution's case to assess whether the evidence presented met the requisite legal standard (see page 298 of the transcript). He found that it did. At pages 310 to 311 of the transcript, as to the complainant's evidence, he found the following:

> "…Mr. Francis is a credible witness. The fact that some things were not in his statement is neither here nor there, because those things were not very significant in my view. Because a statement is not about a detailed chronicle of every single thing that happened. You are essentially capturing highlights, that is essentially what a statement does…I am not of the view that Mr. Francis came here with a view to mislead and to lie to the court. Mr. Francis was simply doing his job as a police officer which is, get the call, respond to the call. And when he did, he was fired upon."

[55] The learned Chief Justice found that he was satisfied so that he felt sure that the incident did in fact take place and that the conditions were sufficient so that the complainant was able to properly see that the man who came from behind the driver of the car and shot at him was the applicant. In this regard, the learned Chief Justice said, at page 314:

> "…I am satisfied so that I feel sure that Mr. Francis had the opportunity, sufficiently proximate, and the time, to see Mr. Atkinson emerge from the seat behind the driver."

[56] Further, at pages 315 and 316, he concluded:

> "I am satisfied so that I feel sure that Mr. Atkinson was not in any house at 11:30 on the night of the 10th of May, 2017, with Miss Campbell and any baby. Mr. Atkinson was at the road where Dunbeholden stops, where Dunbeholden Road meets the Spanish Town Bypass and he came from the car and was firing at the police…I am satisfied that the prosecution have proved Mr. Powell, Mr. Atkinson were where Mr. Francis says they were at 11:30 on the 10th of May 2017. And when they were intercepted by the police they sought to make good their escape by

> shooting at the police, running away across the road into the bush."

[57] It was our view that the learned Chief Justice thoroughly and appropriately dealt with the identification evidence. These grounds, therefore, had no merit.

Ground 5 - The learned trial judge failed to demonstrate in his overall assessment of the evidence, that he had distinctly approached the evidence as respects the applicant without blurring the lines of evidence by contextually assessing the evidence. His summation indicated that he found the complainant's evidence reliable and plausible when juxtaposed to the caution statement of Gordon. His summation reflected that as he reviewed the complainant's evidence though comparing the differences between the identification of Powell and the applicant, the comparison suggests that assessment was being jointly done

A. Submissions

[58] The submissions for the applicant on this ground were as stated in the ground above.

[59] Counsel for the Crown submitted that there was no merit to this ground as the learned Chief Justice specifically assessed the identification evidence in relation to each defendant.

B. Discussion

[60] This ground was unmeritorious and counsel's complaint in this regard was unsustainable. It was also difficult to appreciate this ground as formulated or the submissions in support of it.

[61] Having examined the learned Chief Justice's summation in its entirety, we did not agree that he "blurred the lines of evidence" in his assessment of the evidence, as between the defendants. This was a case in which three accused were tried on the same indictment. The learned Chief Justice examined the evidence against all three separately, as it was given by the sole eyewitness. We saw no instance where it could be said that the learned Chief Justice "made comparisons of the evidence" relating to each of the defendants so that the "comparison suggests that assessment was being jointly done."

[62] Neither did counsel make clear to the court what was meant by that complaint. What was very clear from a reading of the transcript is that the learned Chief Justice assessed whether the burden of proof was met by the prosecution against each defendant separately. This is what is required in a joint trial.

[63] At pages 249 to 250 of the transcript, the learned Chief Justice considered the complainant's identification of the applicant. He then went on to consider the circumstances under which the applicant said he identified the "other man" who was Mr Powell. He recalled the complainant's evidence that he saw Mr Powell come from the left front passenger seat and stand in the light which shone from a streetlight about 10 feet away. He then recalled the complainant's evidence that the applicant came from the driver's seat, where the light from the vehicle shone on him, in addition to the streetlight. The evidence against one defendant, therefore, as recounted by the learned Chief Justice, was that he stood in the light from the streetlight, and against the other, was that both the light from the vehicle and the streetlight shone on him. The learned Chief Justice then continued with the evidence against Mr Powell. He considered, on pages 259 to 260 of the transcript, the number of times the complainant said he had seen Mr Powell before the incident, and at page 250, remarked that if the evidence was accepted, the complainant would have seen the applicant more often than Mr Powell. He continued his assessment of the complainant's evidence of the prior knowledge of Mr Powell, finding that it was not as strong as that of the applicant. He then went on to summarise the prosecution's evidence of identification of the two men, as it related to the **Turnbull** guidelines, in respect of lighting, distance, and prior knowledge, to determine whether the complainant had, at the material time, the ability to make the correct identification of both men. This, in our view, was not an exercise in comparing or contrasting but a simple matter of the learned Chief Justice's recall of the evidence that he had heard from the sole eyewitness.

[64] There is no formula to a judge's summation, and a judge may remind himself of evidence in any way he sees fit, so long as the evidence is recounted correctly. The learned Chief Justice, in the instant case, considered the case against each defendant separately. In doing so, he was entitled to test the credibility and reliability, of the

complainant who gave evidence in respect of each accused. Furthermore, in his final assessment of the evidence, the learned Chief Justice assessed the evidence of the complainant against the applicant separately from that of his co-accused, including its strengths and weaknesses, and declared himself satisfied to the extent that he felt sure that the complainant had properly identified the applicant (pages 313 to 314 of the transcript). He did the same for Mr Powell.

[65] It was also not true to say that the learned Chief Justice only found the complainant's evidence "reliable and plausible when juxtaposed to the caution statement of Gordon". The learned Chief Justice assessed every aspect of the complainant's evidence, in and of itself, including his answers given under rigorous cross-examination and the weaknesses in the evidence. The learned Chief Justice also considered the evidence of Detective Corporal Keisha Robinson ('Det Corporal Robinson') who was on duty at the same station as the complainant, at the material time. Det Corporal Robinson had conducted a briefing session with the complainant's team before they went on patrol that night, and she gave evidence about hearing a radio transmission that necessitated the response from the complainant's team. She spoke to the fact of the complainant's team indicating, by radio transmission, that they had intercepted the Toyota Belta, and that they were being fired upon by men in that car. Following the incident, she recorded a statement from the complainant as to his version of events. The learned Chief Justice also considered evidence, from both Det Corporal Robinson and the complainant, that the police service vehicle that the complainant had been travelling in on the material night was riddled with bullet holes after the incident, which had not been there prior.

[66] This was evidence, which if accepted, would have caused the learned Chief Justice to become satisfied to the extent that he was sure that the incident had occurred.

[67] The learned Chief Justice also accepted the evidence as to the identification parade and the results, being that the complainant identified the applicant as one of the assailants who had engaged him in a shootout. That identification had nothing to do with the caution statement of Mr Gordon. Nor did it have anything to do with the

evidence in relation to the co-accused Mr Powell, or any other evidence relating solely to the other co-accused men. Having listened to and observed the complainant, and having considered the complainant's evidence alongside the other evidence as outlined above, the learned Chief Justice determined that the complainant was credible, was not mistaken and that he believed his evidence of what took place. That he was entitled to do.

[68] The manner in which the learned Chief Justice approached the identification evidence against each defendant, and his consequent findings, aptly demonstrated, in our view, that he did, in fact, properly assess the evidence and the issue of whether the burden of proof had been met in respect of each defendant to the requisite standard.

[69] This ground, therefore, failed.

Conclusion

[70] It was for these reasons that we made the orders set out at para. [8] above.